

Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 11/10/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

James Nyhan, Terri Tavita, and Joelle Del Carlo,

Complainants,

vs.

MCI WorldCom Communications, Inc.,

Defendant.

Case 04-07-045
(Filed July 27, 2004)

OPINION GRANTING MOTION TO DISMISS

Summary

This decision dismisses the complaint for failure to show a violation of law or order upon which the Commission can grant relief.

Background

On July 27, 2004, James Nyhan (Nyhan) filed this complaint stating that he is an inmate at Solano State Prison and that MCI WorldCom Communications, Inc. (MCI) is the sole provider of pay telephone service to inmates of the California Department of Corrections, pursuant to a contract between MCI and the State of California. Nyhan alleges that, "For the last year I have been unable to contact my daughter, grandson or my fiancé by phone." (Part F.1 of form complaint, paragraph 1.) The complaint identifies these individuals, respectively, as Terri Tavita (named as co-complainant), James Tavita, and Joelle

Del Carlo (also named as co-complainant). The complaint also identifies two telephone numbers, one for the Tavitas and one for Del Carlo.

Elsewhere (in section 1 of the attachment to the complaint), Nyhan alleges that the reason he has been unable to contact these individuals is that MCI has “interrupted” or “prevented” collect calls to them from going through.

Nyhan alleges further:

“All attempts to rectify this problem(s) [sic] with MCI have met with demands for funds to be paid in advance or a vigorous effort by MCI to have my friends and family cancel their contract with their current carrier and become part of the MCI family. It was made quite clear that if I wanted to speak with my friends and family they would have to sign a contract with MCI making them (MCI) their primary carrier.” (Part F.1 of form complaint, paragraph 2.)

Nyhan contends that MCI’s actions violate the following provisions of state and federal law and the United States Constitution:

- First Amendment right to association
- Fourteenth Amendment rights to equal protection and due process
- extortion statutes, by attempting to force customers to prepay for calls
- racketeering statutes
- Pub. Util. Code § 2106¹

¹ Pub. Util. Code § 2106 provides, in relevant part:

“Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby or resulting therefrom. . . . *An action to recover for*

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Nyhan also alleges that these violations have deliberately inflicted emotional distress on him and his family. He seeks damages of \$650,000 and an injunction ordering MCI to cease all such violations.

By ruling on August 11, 2004, the assigned administrative law judge (ALJ) advised that most of the allegations in the complaint parallel those pleaded in *Rudder et al. v. MCI*, Case 04-02-024 (*Rudder*), which the Commission dismissed in Decision (D.) 04-07-005 for failure to state a cause of action. The ALJ identified certain unique allegations, pleaded in Part F.1, paragraph 2 of the form complaint, and directed MCI to address those in its answer.

On October 4, 2004, MCI filed its answer, together with a motion for leave to file under seal certain confidential information in the answer. In response to the allegations common to *Rudder*, MCI reiterates its answer in that case. In response to the allegations unique to this case, MCI has supplied information regarding (1) the dates collect calls were made from the prison to each of the telephone numbers listed in the complaint; (2) whether those calls were successfully placed, and why or why not; (3) the details of the billing arrangement between MCI and the customer of record for each telephone number; and (4) the results of its written data requests to Nyhan and both co-complainants.

Discussion

Rudder allegations

D.04-07-005 reviews in detail the contract between MCI and the State of California Department of General Services (DGS) by which MCI provides

such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.” (Emphasis added.)

payphone services to state and local government agencies, including the services available to state prison inmates on a collect call basis. D.04-07-005 also reviews the means MCI has utilized to advise inmates and those they attempt to telephone that, in accordance with MCI's tariff, a collect call will only be completed in one of the following situations: (1) the customer of record at the called number is a customer of MCI; (2) MCI has a billing contract with the local exchange carrier for the called number; or (3) the customer of record at the called number has established a direct billing arrangement with MCI. Under each of these situations, MCI has a means to bill for the collect call; otherwise it does not. Pursuant to MCI's tariff, when neither the first nor second situation exists, the customer of record for the called number must establish a Maximum Security Collect account with MCI in order to receive a collect call from an inmate. Such an account requires a \$50.00 deposit or a credit card number.

Unless one of these three situations exists, a collect call is not connected. Instead, MCI's automated calling system places a telephone call to the called number and a recording explains that an inmate has tried to call and gives instructions on how to make billing arrangements. The automated system will place up to three such calls to the same number.

The complainant in *Rudder* challenged the "block" on his mother's phone line that prevented collect calls from the prison from completing, alleging the same violations of state law, federal law and the United States Constitution that Nyhan alleges. D.04-07-005 dismissed *Rudder* for failure to state a claim upon which relief can be granted, citing the requirements of Pub. Util. Code § 1702.²

² Pub.Util. Code § 1702 provides, in relevant part, that this Commission may entertain any complaint that sets "forth any act or thing done or omitted to be done by any public

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D.04-07-005 expressly found MCI's actions to be consistent with its DGS contract and its tariff and explained that this Commission lacks jurisdiction either to award monetary damages for the torts alleged by complainant or to adjudicate state or federal criminal allegations such as RICO³ or extortion laws.

The "interruption" Nyhan alleges is no different from the "block" alleged in *Rudder*. MCI's practices are governed by the same DGS contract and the same tariff we reviewed in *Rudder*. Thus, pursuant to Pub. Util. Code § 1702, we dismiss all allegations that materially duplicate the allegations we examined in *Rudder*, including allegations that MCI's actions under the contract and the tariff violate the First Amendment right to association, Fourteenth Amendment rights to equal protection and due process, extortion statutes, racketeering statutes, and Pub. Util. Code § 2106.

Unique Allegations

Responding to the ALJ's direction to address, with particularity, the unique allegations in paragraph 2 of Part F.1 of the form complaint (quoted above), the verified answer states that MCI researched its records and conducted discovery in the form of written data requests sent to Nyhan, Ms. Tavita, and Del Carlo. The verification is signed by Michael K. Patterson (Patterson), Senior Government Account Manager for MCI, Inc., which is defendant's parent corporation. Patterson states under penalty of perjury that the averments of fact that we discuss below are true of his own knowledge.

utility, . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission."

³ We infer that complainant is referring to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

MCI's answer reports that its automated calling system dialed the Tavita number three times in January 2004 and that the third attempt was successful (that is, someone answered the telephone and allowed the recorded message to play). Since MCI and the local exchange carrier for the Tavita account did not have a billing and collection agreement that would allow MCI to bill for inmate collect calls, the attempted calls that triggered the automated calling system were not put through. Confidential information redacted from the public version of the answer reveals that after billing arrangements were made that comply with MCI's tariff requirements, subsequent collect calls to the Tavita number were connected. Once a collect call is put through, however, someone at the receiving end must agree to accept the collect call. The collect call fails if the telephone is unanswered or the call is refused.

MCI's records for the Del Carlo number show that three attempts to deliver a recorded notification were made in May 2003 but that each one failed because whoever answered the telephone hung up before the message had played. However, confidential information redacted from the public version of the answer reveals that once billing arrangements were made that comply with MCI's tariff requirements, collect calls to the Del Carlo number were connected as long as those billing arrangements remained current. If a customer does not retain a billing solution that will permit the continued receipt of inmate collect calls, MCI has no obligation to connect those calls.

Finally, MCI reports that on August 25, 2004, it sent one set of data requests to Nyhan, Ms. Tavita and Del Carlo by certified mail, return receipt requested. MCI has received receipts from each of them. MCI requested responses by September 17, 2004, but as of the date MCI filed its answer, only Nyhan had responded.

To the request, “Please state your understanding of the billing arrangement(s) that are required in order for you to place an inmate collect call to a friend or member of your family,” Nyhan responded, “They’ve always been simply collect calls that were billed by their perspective [sic] carriers.” (MCI Answer, paragraph 80.) MCI has received no answer to the request, “If you contacted MCI regarding receiving collect calls from an inmate at CSP-Solano, please state what you understood MCI would require in order for you to receive collect calls from an inmate at CSP-Solano.”

Nyhan’s data request response appears to indicate a misunderstanding of the terms of MCI’s contract with DGS or of MCI’s tariff. We have already determined we must dismiss allegations that the contract and tariff are unlawful. On the other hand, Nyhan’s response has no bearing on the remaining allegations, that MCI exerted undue pressure on the Tavitas or Del Carlo (or unnamed others) to change their local exchange carrier in order to receive inmate collect calls. MCI’s verified answer contains a detailed, unambiguous description of the interaction between MCI and Del Carlo (in 2003) and between MCI and Ms. Tavita (in 2004) after initial efforts to place inmate collect calls to them failed. It appears MCI properly acted to advise both Del Carlo and Ms. Tavita of the options available to them if they wished to receive inmate collect calls, and in fact they chose different options. This reality, coupled with their failure to respond to MCI’s data request asking for the specific facts that support the general allegations in paragraph 2 of Part F.1 of the form complaint, negates those allegations and leaves no triable issue of fact. Therefore on the pleadings before us, and under the authority of Rule 56 which authorizes motions to dismiss, on our own motion we will dismiss these allegations for failure to state a cause of action under Pub. Util. Code § 1702.

Need for Hearing

The documentation provided in MCI's verified answer leaves no disputed issues of material fact for evidentiary hearing. Thus, no hearings are necessary and Article 2.5 of the Commission's Rules of Practice and Procedure ceases to apply to this proceeding, with the exception of the ex parte prohibition in Rule 7.

Motion for Leave to File Under Seal

By motion filed concurrently with its answer, and under the authority of Pub. Util. Code § 2891(a), MCI seeks leave to file under seal limited portions of the answer and four attachments to it in order to protect the privacy of the persons concerned. The information that MCI asks us to seal includes references to the personal financial information and/or services purchased by Ms. Tavita and Del Carlo and to the dates that inmate collect calls were placed to their numbers, together with the four invoices that comprise Attachments 11-12.

Section 2891(a) prohibits a telephone corporation from making public several categories of information about a residential subscriber unless it has obtained written consent to do so. The categories of information that fall within the statute include the subscriber's personal calling patterns, credit or other financial information, and the kinds of telecommunications services the subscriber has purchased. MCI states that it has filed the motion "as a precautionary measure" to guard against improper disclosure, though MCI suggests that application of the statute to this situation is not clear. (MCI motion, p. 2.)

This case does not present circumstances where we need probe the boundaries of statutory intent. MCI has made limited and, in our judgment, appropriate redactions from the publicly filed documents. The public interest in

divulging the redacted information is nominal, considering the narrow reach of this complaint case. We will grant the motion.

Comments on Draft Decision and Subsequent Information

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure (Rule or Rules).

Nyhan filed comments on November 22, 2004, which, among other things, clarify that the relief he seeks in this proceeding includes a list of the carriers in the states of California and New York with whom MCI has billing arrangements that permit it to recover charges for inmate collect calls. By ruling on December 2, the ALJ directed MCI to supply certain additional information. The ruling recognizes that the supplemental relief should have been pleaded in the complaint, but determines to address it so as to reach a “just, speedy, and inexpensive” resolution of this case, under the authority of Rule 87. On December 10, with leave from the ALJ, MCI jointly filed its reply comments and a response to the ALJ ruling.

MCI’s response states that neither its contract nor the associated tariffs require it to provide public notice of the local carriers with whom it has billing arrangements that govern payment of collect calls from prisons. MCI states that an affected person may “identify a local exchange carrier serving his/her locale that will bill and collect charges on behalf of MIC ... by asking the local exchange carrier of his/her choice whether it has a billing arrangement with MCI.” (MCI response, p. 3.) MCI explains that MCI does not refer an individual to a particular local exchange carrier because (1) the identify of those who bill through clearinghouse services is prone to frequent change and (2) MCI wishes to avoid claims of anti-competitive conduct.

As directed, however, ALJ discloses that it has billing arrangements with SBC and Verizon and with three clearinghouses—Billing Concepts/ACI Billings Services, NECA Services, and Verisign. MCI also includes, as Attachment A to its response, a list of 43 local exchange carriers in New York and 41 local exchange carriers in California that can receive MCI charges. The response, including Attachment A, was served on Nyhan. Thus, Nyhan has obtained the relief he sought. MCI cautions that the list is provisional and time sensitive, largely because of the frequent changes in the list of entities participating in the underlying clearinghouses services. Though Attachment A was marked confidential, MCI has not sought to file the attachment under seal. MCI has clarified that while this designation is one used internally by the company, the material does not meet the Commission's requirements for confidential treatment.

The remainder of Nyhan's comments requires no revision of this decision.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. MCI's billing arrangement requirement is in its published tariffs, as well as its contract with DGS.
2. When initial efforts to place inmate collect calls to them failed, Ms. Tavita and Del Carlo chose different options among the three available for ensuring the completion of such calls and thereafter, inmate collect calls were put through to them.
3. Though Ms. Tavita and Del Carlo both received MCI's certified data request, neither has responded.

4. MCI has acted in conformity with its contract and tariff.
5. Nyhan seeks damages and an injunction.

Conclusions of Law

1. The complaint should be decided on the pleadings, since no triable issue of fact has been established.
2. No hearing is necessary.
3. Neither complainant nor the named co-complainants have shown any violation of law or order over which this Commission has jurisdiction.
4. The Complaint should be dismissed for failure to state a claim under § 1702, effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint in Case (C.) 04-07-045 is dismissed.
2. The October 4, 2004 motion of MCI WorldCom Communications, Inc. for leave to file confidential information under seal is granted.
3. C.04-07-045 is closed.

This order is effective today.

Dated _____, at San Francisco, California.